IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 281 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

LILABEN VARUBHAI NATHABHAI VAGHARI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 281 of 2002

MR PK JANI for Petitioner No. 1

MS PB SHETH APP for Respondent No. 1

MR MEHUL SHARAD SHAH for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 25/09/2003

ORAL JUDGEMENT

The petitioner herein has preferred this revision application u/s.397 read with s.401 of the Code of

Criminal Procedure, 1973 (for short, "the Code") in order to challenge a judgment and order dated 12/06/02 recorded by the learned Addl. Sessions Judge, Mehsana in Criminal Revision Appl.No.129/2001 under which the learned Addl. Sessions Judge allowed the said revision application and set aside an order of the learned J.M.F.C., Visnagar dated 30/08/01 passed in Cr.Misc.Appl.No.147/1999 under which the learned Magistrate granted maintenance to the petitioner u/s.125 of the said Code, at Rs.500/- per month from the date of the application and also awarded cost of Rs.10,000/- to the petitioner.

2. The petitioner submitted an application u/s.125 of the said Code to the aforesaid Magisterial Court stating that the respondent herein, being the husband of the petitioner, had neglected or refused to maintain her and that the respondent had sufficient means and despite the said position, the petitioner was not being maintained. Therefore, she was entitled to maintenance u/s.125 of the Code. The respondent herein had taken up a contention that the petitioner was not a legally married wife of the respondent, as much as the respondent had his earlier marriage intact and in force and therefore, since the petitioner was not a legally married wife of the respondent, she could not be treated to be a "wife" within the meaning of s.125 of the said Code and therefore, she was not entitled to maintenance.

3. The trial court rejected the said contention and granted maintenance as aforesaid.

4. Feeling aggrieved by the said judgment and order of the trial court, the respondent herein preferred the aforesaid criminal revision application before the Sessions Court at Mehsana. The learned Addl. Sessions Judge accepted the said defence and held that since the present petitioner was not a legally married wife of the present respondent, she was not entitled to claim maintenance u/s.125 of the Code. Therefore, the learned Addl. Sessions Judge allowed the said revision application and set aside the order passed by the learned Magistrate granting maintenance to the present petitioner. Feeling aggrieved by the judgment and order of the learned Addl. Sessions Judge, the petitioner has preferred this revision before this Court.

5. It has been mainly contended here that the learned Addl. Sessions Judge has not properly appreciated the legal and factual aspects placed before him; that, the judgment and order of the learned Addl. Sessions Judge are contrary to the provisions made in

s.125 of the Code and therefore, the said order is required to be quashed and set aside; that, the learned Addl. Sessions Judge had exceeded the jurisdiction vested in him; that, on the whole, the judgment and order of the learned Addl. Sessions Judge are illegal and erroneous and deserve to be set aside. The petitioner has, therefore, prayed that the present revision application be allowed and the judgment and order of the learned Addl. Sessions Judge may be set aside and the judgment and order passed by the learned Magistrate as aforesaid may be restored.

6. On receipt of the revision application, Rule was issued and in response to the service of notice of Rule, Ms.P B Sheth learned APP appeared on behalf of the State and Mr.M S Shah learned advocate appeared on behalf of respondent no.2. I have heard the learned advocates for the parties and have perused the papers.

7. The petitioner has contended right from the beginning that she is a legally married wife of the contesting respondent and therefore, is entitled to get maintenance from the contesting respondent. The contesting respondent has taken up a contention right from the beginning that the petitioner was not his legally married wife and therefore, she was not entitled to maintenance u/s.125 of the Code.

8. During the course of evidence, it has transpired that the respondent herein was already married and was staying with his wife, namely Leelaben alias Manguben. The respondent has produced evidence to that effect and it has also come on record that the wife of the contesting respondent has given birth to two children which could not be seriously disputed. So, it is clearly established on record of the trial court that the respondent is a married person and his wife is alive. In that case, when the respondent is a married person and when his wife is alive and when the second respondent has not divorced his wife, then the petitioner, even if taken to have been staying with the contesting respondent, cannot be treated to be a legally married wife of the contesting respondent.

9. Even if we take it that the petitioner was staying with the contesting respondent and that there was long cohabitation, a presumption will not arise in favour of the petitioner and in favour of a marriage between the two, when the wife of the second respondent is alive and is staying with the contesting respondent.

10. In that view of the matter, it has to be accepted that the petitioner is not a legally married wife of the contesting respondent and consequently, she cannot be treated to be a wife, within the meaning of s.125 of the Code and therefore, would not be entitled to maintenance u/s.125 thereof.

11. On this aspect, we can refer to a decision in the case of Khemchand Om Prakash Sharma V/s. State of Gujarat reported in 2000 SC (Cri.) 748. There it was observed that where the appellants first wife was alive and there has been no annulment of marriage by a decree of divorce or otherwise, then the High Court committed an error in granting maintenance in favour of the second wife. Therefore, the order granting maintenance was set aside by the Hon'ble the Supreme Court.

12. Similar view was taken in the case of Bakulabhai V/s. Gangaram reported in (1988) 1 SCC 537. There it was observed by the Hon'ble the Supreme Court that if a hindu woman marries, after commencement of the Hindu Marriage Act. 1955, a hindu male having wife or wives already living, then, she would not be entitled to maintenance u/s.125 of the Code, since her marriage would be null and void u/s.11 read with s.5(1)(i) of the said Act.

13. In the present case, we find that the contesting respondent is having a wife and his marriage with the said wife is still subsisting and therefore, even if the petitioner has contacted second marriage with the second respondent, then also, the said marriage cannot be treated to be legal marriage in the eye of law, in view of the provisions made in the Hindu Marriage Act, 1955 referred to hereinabove. In that view of the matter, the petitioner cannot be treated to be a legally married wife of the second respondent and consequently, she will not be entitled to maintenance u/s.125 of the Code. The learned Addl. Sessions Judge while allowing the said revision application has taken exactly the same view. The said approach and finding of the learned Addl. Sessions Judge cannot be treated to be illegal. In that view of the matter, there is no reason to interfere with the said judgment and order of the learned Addl. Sessions Judge.

14. For the foregoing reasons, there is no merit in the present revision application and it deserves to be dismissed. Accordingly, this revision application is ordered to be dismissed. Rule discharged.

(D. P. Buch, J.)

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